IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-524

FRED G. MORITT,

Appellant,

against

THE GOVERNOR OF THE STATE OF NEW YORK, THE ATTORNEY GENERAL OF THE STATE OF NEW YORK and THE SECRETARY OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Appellees, pursuant to Rule 16 of the Rules of this Court, respectfully move that this appeal be dismissed for want of a substantial federal question or that the judgment below be affirmed.

Opinions Below

The opinion of the Court of Appeals of the State of New York is published at 42 N Y 2d 348, 366 N.E. 2d 1285 and 397 N.Y.S. 2d 929, and is reproduced as appendices A and B to the Jurisdictional Statement. The opinion of the Ap-

pellate Division of the Supreme Court, Second Department is published at 53 A D 2d 857, 385 N.Y.S. 2d 584, and is reproduced at Appendix D to the Jurisdictional Statement. The decision of the Supreme Court, Kings County is unpublished. It is reproduced at Appendix E to the Jurisdictional Statement.

Jurisdiction

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2).

Statute Involved

New York Election Law § 136(5) is reproduced at page 3, Jurisdictional Statement.

Statement of the Case

Appellant brought this action to declare unconstitutional and enjoin the enforcement of N.Y. Election Law §§ 131(2) and 136(5) insofar as they pertained to the designation of candidates for Attorney General of the State of New York. As appellant notes however, J.S. 1-2, only § 136(5) is involved on this appeal.

The facts of this case are not in dispute; indeed, the statement of the case J.S. 3-6 is drawn largely from appellees' brief in the Appellate Division and pages 2-4 of their motion to dismiss or affirm in this Court in *Moritt* v. *Rockefeller*, #72-432, 409 U.S. 1020 (1972).

Appellant seeks to challenge as unconstitutional the requirement of N.Y. Election Law § 136(5) that a candidate for statewide office, not designated by his party's state committee or who does not receive 25% of the committee's votes, may appear on the ballot only if he presents petitions by 20,000 enrolled party members, including 100 from each of one-half of the State's Congressional districts. However, as in the case of *Moritt* v. *Rockefeller, supra,* appellant never tendered even the 12,000 signatures, which was the standard *he* set as constitutionally reasonable.

ARGUMENT

Appellant has failed to raise any substantial questions as to the constitutionality of N.Y. Election Law § 136(5).

A.

This action was directed to the 1974 primary and the Democratic State Committee proceedings of 1974 which led to the designation of the candidates who competed therein. The primary, indeed, the election is now a matter of ancient history and this action is now moot and academic. Appellant does not even indicate that he would ever offer himself again as a candidate for any statewide elective office. Thus, there is no live controversy now pending before this Court, *Brockington* v. *Rhodes,* 396 U.S. 41, 43-44 (1969); *Golden* v. *Zwickler,* 394 U.S. 103, 110 (1969).

B.

As with his prior challenge to the constitutionality of N.Y. Election Law § 136(5), appellant has failed to satisfy even his self-imposed requirements for being placed on the ballot, *i.e.* 12,000 signatures. No petitions were ever filed on his behalf. While the State courts may have been willing to dispose of his suit on the merits, appellant nevertheless lacks the necessary standing to entitle him to a substantive adjudication, *Warth* v. *Selden,* 422 U.S. 490, 499 (1975); *Sierra Club* v. *Morton,* 405 U.S. 727, 732 (1972); *Flast* v. *Cohen,* 392 U.S. 83, 100 (1968). See also: *Singleton* v. *Wulff,* 428 U.S. 106, 110-112 (1976).

C.

In our motion to dismiss or affirm in *Moritt* v. *Rockefeller, supra,* we stated at pages 6-8:

> "The requirement of § 136(5) that a person who aspires to a state-wide primary candidacy obtain 20,000 signatures on his designating petition does not impose an unconstitutional burden. Only last year this Court. In upholding a requirement of obtaining the signatures of 5% of the electorate on an independent nominating petition for state-wide office, declared:
>
> > "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization and its candidates on the ballot—the interest, if no other, in avoiding confusion, deception and even frustration of the democratic process at the general election." *Jenness* v. *Fortson,* 403 U.S. 431, 442 (1971).
>
> The state's interest in protecting the integrity of the political processes from frivolous and fraudulent candidacies was again reaffirmed in *Bullock* v. *Carter,* 405 U.S. 134, 145 (1972).
>
> "Out of a population in New York State of 17,979,712, see 1972 N.Y. Redbook, p. 11, there were as of October 1971, 8,070,222 registered voters; 3,663,201 were enrolled Democrats. (Registration and enrollment figures from N.Y. Dept. of State Press Releases, October 29, 1971 and March 25, 1972.) Thus the 20,000 signatures required for a place on the state-wide primary ballot is far less than the typical 1% of a state's population that, *a fortiori,* may be required as a showing that a candidacy is not frivolous, *Moore* v. *Ogilvie,* 394 U.S. 814 (1968); *Williams* v. *Rhodes,* 393 U.S. 23, 33 and f.n. 9 (1968). Indeed, it is even less than 1% of appellant's party's enrollment.

> "The establishment by the Legislature of a 20,000 signature requirement for state-wide independent candidacies and party designations, N.Y. Election Law §§ 138(5), 136(5), in place of the 12,000 figure in the old version of § 138(5), was not irrational or unjustified as plaintiff sugests, cplt. ¶s 20, 21 (J.S. 48-49). Such a claim is untrue as a matter of history. The 12,000 figure was first established by L. 1918, Ch. 323 § 14, and was based on 1910 population figures of 9,113,614 (1972 World Almanac, p. 149). The State's population had nearly doubled 53 years later when the law was amended to require 20,000 signatures on a state-wide petition, L. 1971, Ch. 424. The change in the figure merely reflected that increase in the state's population.
>
> "There is nothing unconstitutional, per se, about a requirement that a state-wide candidate show state-wide support before being permitted on the ballot, *Moore* v. *Ogilvie, supra,* 394 U.S. at 818-19. Such a 'distributive' requirement becomes suspect only when it gives a voter in one locality greater power than a voter in another part of the state, *Moore* v. *Ogilvie, id.; Socialist Workers Party* v. *Rockefeller,* 314 F. Supp. 984, 990-01 (S.D.N.Y.), affd. 400 U.S. 806 (1970). In the light of the Socialist Workers decision the New York Legislature amended both § 138(5) and the analogous § 136(5) dealing with designating petitions, to provide that the 'spread' be from one-half of the state's Congressional districts, which are, without question, apportioned according to population, *Wells* v. *Rockefeller,* 311 F. Supp. 48 (S.D.N.Y. 1970), affd. 398 U.S. 901 (1907), as are the new one, L. 1972, Chs. 76, 77 and 78, which are equally apportioned to within 1/10 of 1% of their mean population, Interim Report of the Joint Legislature Committee on Reapportionment (Albany, N.Y., Mar. 5, 1972) p. A-11.
>
> "Far from imposing an onerous burden upon an insurgent candidate, New York Election Law § 136(5)

provides a fair opportunity for an insurgent to compete for a state-wide party nomination; it properly balances plaintiff's political rights with the party's right to reasonable order and stability, *Rosario* v. *Rockefeller,* 458 F. 2d 649 (2d Cir.), cert. granted 406 U.S. 957 (1972) and protection from frivolous and fraudulent candidacies, *Bullock* v. *Carter, supra.*

"With all deference to Judge Tenney, we think his analysis (J.S. N-Q; 346 F. Supp. 39-41) is incorrect; it goes far beyond this Court's 'one-man, one-vote' rulings. Moreover, these views could not be implemented without rendering the party primary utterly unmanageable, either by courts or by legislatures. Constantly shifting party enrollments would require redistricting even more frequently than is now required by population shifts. Even worse, the party enrollment districts might bear little resemblance to the legislative or congressional districts which are the basis of representative government in this country."

The law has not changed in the past five years. Indeed, this Court has continued to uphold the authority of the government to regulate the ballot and to place appropriate limits on the right of political association, *American Party of Tex.* v. *White,* 415 U.S. 767, 782-783 (1974) (upholding a requirement to present a petition with signatures equal to 1% of the vote for Governor in the last general election which amounted to 22,000 signatures); cf. *Storer* v. *Brown,* 415 U.S. 724, 738-739 (1974) (upholding as facially responsible a petition requirement of 5% of total vote cast in last general election equal to 325,000 signatures) see also: *Buckley* v. *Valeo,* 424 U.S. 1, 25-27 (1976).

CONCLUSION

The appeal should be dismissed, or the judgment affirmed.

Dated: New York, New York
December 13, 1977.

Respectfully submitted,

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